No. 96-243

In the

Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,
Petitioner,
v.
TAHOE REGIONAL PLANNING AGENCY,
Respondent.

On Petition for Writ of
Certiorari to the United States Court
of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF TAHOE LAKEFRONT OWNERS' ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF TAHOE LAKEFRONT OWNERS' ASSOCIATION IN SUPPORT OF PETITIONER

This motion of Tahoe Lakefront Owners' Association (TLOA) to file the annexed brief amicus curiae is respectfully made pursuant to Supreme Court Rule No. 37(b). Counsel for petitioner, Pacific Legal Foundation, has consented to the filing of this brief and that consent has been lodged with the clerk of this Court. Consent has been withheld by counsel for Tahoe Regional Planning Agency (TRPA).

TLOA, incorporated as Shorezone Property Owners Association, Inc., is a nonprofit Nevada Corporation. Most of TLOA's members own lakefront property on Lake Tahoe in California or Nevada, although ownership of lakefront property is not required for membership. TLOA monitors and advises regulatory bodies, such as TRPA, on issues of planning and regulation of recreational and residential facilities on property located along the shore of Lake Tahoe.

It is TLOA's position that the transferable development rights program created by TRPA is nothing more than a scheme to allow government to avoid its duty to compensate landowners for overregulation of their property. Amicus firmly believes that a review of this matter is necessary in order that the constitutional issues involved may be properly considered. The decision below allows government entities to create property rights which impose an insurmountable barrier to landowners with valid claims under the Fifth Amendment to the United States Constitution.

For the foregoing reasons, TLOA requests that the motion to file the annexed brief amicus curiae be granted.

DATED: September 5, 1996.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF TAHOE LAKEFRONT OWNERS' ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The interest of amicus is set forth in the preceding motion for leave to file this brief.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 80 F.3d 359 (9th Cir. 1996).

STATEMENT OF THE CASE

INTRODUCTION

The facts of this case, as set forth in petitioner Bernadine Suitum's Petition for Writ of Certiorari and herein adopted, raise the issue of whether transferable development rights must be sold before a landowner may bring a takings claim under the Fifth Amendment to the United States Constitution.

The issue arose after Ms. Suitum filed an action in the United States District Court, District of Nevada, asserting that restrictions imposed by the Tahoe Regional Planning Agency (TRPA) on the use of her property amounted to a taking of private property for public use without just compensation and a violation of civil rights. The District Court, ruling on TRPA's motion for summary judgment, acknowledged that Mrs. Suitum "may not develop or build on the parcel of land she owns and that no development rights may be transferred to the property at issue." Nevertheless, the District Court held that because Ms. Suitum had not applied to transfer development rights created by TRPA, her claims were not ripe for judicial review.

The Ninth Circuit Court of Appeals upheld the District Court's decision. The decision allows government to create an intricate system of sham property rights which effectively precludes landowners from bringing claims seeking just compensation for public use of their property. The decision creates an unfortunate precedent regarding the role of transferable development rights in a takings action.

SUMMARY OF ARGUMENT

A transfer of development rights program should not be permitted to preclude a takings action when that program is inherently unfair and thus unconstitutional. Under this Court's holding in ***Williamson County Regional Planning Commission v. Hamilton Bank***, 473 U.S. 172, 191 (1985), a property owner must obtain a final decision regarding development of his or her property before challenging application of a regulation limiting development. ***Williamson County*** does not require a landowner to pursue

unconstitutional procedures, futile procedures, or procedures creating undue hardship in order to obtain a final decision at the administrative level.

ARGUMENT

I

THE TRANSFER OF DEVELOPMENT RIGHTS PROGRAM IS UNCONSTITUTIONAL; THUS, PARTICIPATION IN THAT PROGRAM CANNOT SERVE AS A PREREQUISITE TO A TAKINGS CLAIM

TRPA's determination that Ms. Suitum's property is located in a Stream Environment Zone (SEZ) precludes any development on her property. The right to build a home on one's own property, particularly when that property is located in an established subdivision, is a property right within the meaning of the Fifth Amendment to the United States Constitution. ***Nollan v. California Coastal Commission***, 483 U.S. 825, 845 n.2 (1987).

Deprivation of such a property interest compels due process of law under the Fifth and Fourteenth Amendments to the United States Constitution. Due process limits government action by preventing enforcement of unreasonable, arbitrary or capricious laws, and by requiring a substantial relation between government action and the objective sought to be attained. ***Pruneyard Shopping Center v. Robins***, 477 U.S. 74, 85 (1980). The transfer of development rights (TDR) program created by TRPA does not meet those standards.

TRPA's TDR program allows Ms. Suitum to transfer to the owner of a development-eligible lot a residential

development allocation (if Ms. Suitum could acquire one from the county by lottery) (Tahoe Regional Planning Agency Code of Ordinances (TRPA Code) §§ 34.3.A and 34.3.D), residential development rights (TRPA Code § 34.2.A), and additional land coverage for the transferee's property (TRPA Code § 20.3.C(2)(c)). In exchange for the transfer of development rights on her property, Ms. Suitum would have to agree to keep the land forever in its natural state. (TRPA Code §§ 20.3.C(7)(a), 34.2.B, 34.3.G, and 34.5.B. TRPA provided evidence, accepted by the Court of Appeals, that Ms. Suitum's TDR's are valued between $10,000 and $30,000. ***Suitum v. Tahoe Regional Planning Agency***, 80 F.3d 359, 363 (9th Cir. 1996). The TDR program is unreasonable, arbitrary, and capricious because it requires the owner of property in an SEZ to essentially quitclaim property rights in exchange for a fraction of the value of the property.

The March 30, 1994, Order of the District Court states that the TDR program created by TRPA was designed to provide relief to owners of property in the SEZ. Even if that is so, in practice the program does not assist property owners prohibited from developing their properties. Uncontroverted evidence submitted by Ms. Suitum and disallowed by the Court of Appeals (***Suitum***, 80 F.3d at 363) shows the TDR program has never produced any sales and there is no market for TRPA's development rights.

In ***Fred F. French Investment Co., Inc. v. City of New York***, 350 N.E.2d 381 (N.Y. App.), ***reargument denied***, 356 N.E.2d 491, ***appeal dismissed, cert. denied***, 429 U.S. 990 (1976), the court explained the folly of transferable development rights.

> "[T]he development rights of the parks were not nullified by the city's action. In an attempt to preserve the rights they were severed from the real property and made transferable to another section of

mid-Manhattan in the city, but not to any particular parcel or place. There was thus created floating development rights, utterly unusable until they could be attached to some accommodating real property, available by happenstance of prior ownership, or by grant, purchase, or devise, and subject to the contingent approvals of administrative agencies. In such case, the development rights, disembodied abstractions of man's ingenuity, float in a limbo until restored to reality by reattachment to tangible real property. Put another way, it is a tolerable abstraction to consider development rights apart from the solid land from which as a matter of zoning law they derive. But severed, the development rights are a double abstraction until they are actually attached to a receiving parcel, yet to be identified, acquired, and subject to the contingent future approvals of administrative agencies, events which may never happen because of the exigencies of the market and the contingencies and exigencies of administrative action. The acceptance of this contingency-ridden arrangement, however, was mandatory under the amendment.

"The problem with this arrangement ... is that it fails to assure preservation of the very real economic value of the development rights as they existed when still attached to the underlying property. By compelling the owner to enter an unpredictable real estate market to find

> a suitable receiving lot for the rights, or a purchaser who would then share the same interest in using additional development rights, the amendment renders uncertain and thus severely impairs the value of the development rights before they were severed." ***Id.***, 350 N.E.2d at 387-88 (citations omitted).

TRPA's TDR program is simply a scheme by which TRPA avoids compensating overregulated property owners. Owners of property falling within the SEZ must attempt to sell TDR's for which there is no market, and owners of development-eligible property are forced to purchase property rights which they would have had but for TRPA's actions.[1] This compensation avoidance scheme may advance government's interest in saving money, but it does nothing to serve landowners under TRPA's jurisdiction. A regulatory scheme designed as a ruse to avoid paying full condemnation damages is a clear violation of due process and cannot serve as a prerequisite to a takings claim.

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[1] TRPA's program limiting development of property outside the SEZ and allowing landowners to circumvent those limitations by purchasing TDR's fails to meet standards clearly articulated by this Court. ***See***, ***Nollan v. California Coastal Commission***, 483 U.S. at 837 (There must be a nexus between government action and the end advanced as the justification for the action.); ***Dolan v. City of Tigard***, 512 U.S. ___, 129 L. Ed. 2d 304, 320 (1994) (A public entity "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.).

II

ATTEMPTS TO TRANSFER DEVELOPMENT RIGHTS WOULD BE FUTILE

A constitutional challenge to a land use regulation is ripe only after a landowner has received a final decision from the government agency charged with implementing the regulation. ***Williamson County Regional Planning Commission v. Hamilton Bank***, 473 U.S. at 186. This requirement assures that a government agency has every opportunity to allow development of the particular property in question before a case is adjudicated. ***Hodel v. Virginia Surface Mining and Reclamation Association, Inc.***, 452 U.S. 264, 297 (1981). A landowner must apply and reapply to develop a piece of property until it is clear no development of the property will be allowed. ***MacDonald, Sommer & Frates v. County of Yolo***, 477 U.S. 340, 351-52 (1986). However, such actions may be excused where further attempts to obtain acceptance of a development proposal would be futile. ***Hoehne v. County of San Benito***, 870 F.2d 529, 534 (9th Cir. 1989).

The question of whether a final decision has been rendered by a government agency is one of fact to be determined on a case by case basis.

> "Fortunately for the federal courts, the solution to this problem [whether a final decision has been reached] is not achieved by color-matching putative precedents and comparing snippets from stated rationales contained in past cases. As in many types of litigation, resolution of this issue turns on the record facts. Relevant cases in the Supreme Court and [the Ninth Circuit Court of Appeals] are extremely fact-specific. Only the facts tell us whether a final decision had been reached." ***Id.*** at 533.

The facts of Ms. Suitum's case reveal that TRPA reached a final decision regarding development of Ms. Suitum's property. Ms. Suitum is prohibited from pursuing any development of her property. TRPA Code § 20.4. The Ninth Circuit determined that Ms. Suitum must also submit an application for the transfer of development rights before her takings claim is ripe. The required application to TRPA is an approval form for the actual transfer to the receiving parcel which must already be identified. ***See*** Transfer Approval Form.

Uncontroverted evidence submitted by Ms. Suitum and disallowed by the Court of Appeals demonstrates that there is no market for the development rights. The Court of Appeals disregarded that evidence, set forth in the affidavit of Paul Kaleta, a former TRPA staff member familiar with TRPA ordinances and application procedures for transfer of development rights, because Mr. Kaleta was not determined to be an expert in valuing development rights. ***Suitum***, 80 F.3d at 363.

However, valuation of development rights is not the issue when attempting to determine whether submission of an approval form for the transfer of development rights would be futile. The issue is whether an attempt to transfer the development rights would be futile, thus excusing the landowner from pursuing that avenue. Mr. Kaleta was qualified to testify as to whether development rights have ever been sold, and exclusion of his testimony was an abuse of discretion.

It would be futile for Ms. Suitum to attempt to transfer the development rights created by TRPA because there is no market for those rights. A final decision has been rendered in this case, and Ms. Suitum should be allowed to litigate the substantive issues of her case.

III

THE NINTH AND SEVENTH DISTRICTS HAVE ADOPTED INCONSISTENT APPROACHES TO DETERMINING WHETHER A CASE IS RIPE UNDER *WILLIAMSON COUNTY*

The Seventh Circuit Court of Appeals, in ***Marusic Liquors, Inc. v. Daley***, 55 F.3d 258, 260-61 (7th Cir. 1995), held that the owner of a liquor store did not have to try to sell his business before bringing an action to challenge an ordinance restricting the transfer of liquor licenses. The court determined that the final decision ripeness doctrine, as described in ***Williamson County Regional Planning Commission v. Hamilton Bank***, 473 U.S. 172, was satisfied.

Cases cited by the Seventh Circuit Court of Appeals, examined the hardship to the parties if judicial action is postponed. ***See Abbott Laboratories v. Gardner***, 387 U.S. 136, 148-49 (1967) (A court must evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration when determining whether a case is ripe for judicial resolution.); ***Triple G Landfills, Inc. v. Board of Commissioners of Fountain County, Indiana***, 977 F.2d 287, 289 (7th Cir. 1992) (The court reviewed the scope and practical effect of the ordinance in question to determine hardship to the parties resulting from delay of judicial review.).

The Ninth Circuit Court of Appeals did not examine the hardship Ms. Suitum would suffer if required to transfer development rights. As discussed above, in exchange for the transfer of development rights on her property, Ms. Suitum would have to agree to keep the land forever in its natural state. Ms. Suitum would have to prematurely quitclaim her property rights in exchange for a fraction of the value of the property. This would create a tremendous hardship because

TRPA's regulations creating the SEZ, as applied to Ms. Suitum's property have effectively taken her property without compensation.

CONCLUSION

This Court has not directly addressed the issue of the legality of TDR schemes.[2] The TDR program adopted by TRPA provides clear evidence of the inherent unfairness of such schemes. An unfair law cannot provide the basis for denial of the right to bring an action against government for compensation resulting from overregulation of private property.

[2] In ***Penn Central Transportation Co. v. City of New York***, 438 U.S. 104, 137 (1978), the Court stated in dicta that such a scheme appeared to provide compensation for an alleged taking. However, in that case, the Court did not directly address the validity of the TDR scheme. ***Id.*** 122 n.24.

For this reason, and the reasons set forth above, amicus respectfully requests that this Court reverse the decision of the court below.

DATED: September 5, 1996.

Respectfully submitted,

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